No. 17-1702

IN THE
Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORPORATION, DANIEL COUGHLIN, JEANETTE SANTIAGO, CORY BRYCE,

Petitioners,

v.

DEEDEE HALLECK, JESUS PAPOLETO MELENDEZ,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF THE KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The Knight First Amendment Institute at Columbia University ("Knight Institute" or "Institute") is a non-partisan, not-for-profit organization that works to defend the freedoms of speech and the press in the digital age through strategic litigation, research, and public education. The Institute's aim is to promote a system of free expression that is open and inclusive, that broadens and elevates public discourse, and that fosters creativity, accountability, and effective self-government.

The Institute is particularly committed to protecting the integrity and vitality of online forums in which citizens communicate with each other and with their elected representatives about matters of public concern. The Institute has represented plaintiffs in two First Amendment challenges to government officials' practice of blocking critics from social media accounts used for official purposes. *Davison v. Randall*, Nos. 17-2002, 17-2003, 2019 WL 114012 (4th Cir. 2019), *as amended* (Jan. 9, 2019) (holding that a local government official violated the First Amendment when she blocked a Virginia resident from her official Facebook Page); *Knight First Amendment Inst. at Columbia Univ. v. Trump*,

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[1] *Amicus* has provided timely notice to counsel for all parties and has received their written consent. Sup. Ct. R. 37.3(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made a monetary contribution to fund the prepration or submission of the brief. Sup. Ct. R. 37.6.

302 F. Supp. 3d 541 (S.D.N.Y. 2018) (holding that President Donald Trump and his aide violated the First Amendment by blocking users from the @realDonaldTrump Twitter account), *appeal filed*, No. 18-1691 (2d Cir. 2018).

SUMMARY OF ARGUMENT

Amicus Knight First Amendment Institute at Columbia University respectfully submits that this Court should affirm the judgment below for the narrow and fact-specific reasons set forth in the respondents' brief. The Knight Institute is filing this brief to address a question that is not directly presented by the parties' main arguments, but that the Court might have to consider in its resolution of this case: whether and when the public forum doctrine applies to expressive spaces established by government actors on private property. Another *amicus*—the Chicago Access Corporation—encourages the Court to hold that the public forum doctrine has no application except to property owned outright by the government or in which the government has a property interest. For the reasons discussed below, the Knight Institute submits that the Court should not abandon its flexible approach to public forum doctrine in favor of this rigid rule. Adopting it would have deleterious and far-reaching implications for the integrity and vitality of expressive spaces that are increasingly important to our democracy in the digital age.

The public forum doctrine has long served to safeguard government-established expressive spaces against government censorship and

distortion. The Court has recognized that the principles underlying the doctrine apply not only to parks and sidewalks but also to other spaces that the government intentionally opens up to the public for expressive activity. Thus, the Court has protected speech against government censorship in designated public forums as well as in traditional ones. Likewise, the Court has held that the doctrine applies not just to physical spaces but to "metaphysical" spaces as well. In each of these contexts, the Court has focused on the nature and function of the forum.

Today, government actors are increasingly harnessing the power of the Internet and social media to establish new expressive spaces that function as digital analogs to traditional town halls and public squares. These government-controlled digital forums are critical to public discourse, but they reside or rely on communications networks that are, as a general matter, privately owned.

The Court should decline the invitation to adopt a rigid rule that the public forum doctrine is inapplicable unless the government holds a formal property interest in the space at issue. Adopting that rule would require the Court to overrule or significantly narrow longstanding precedent, would allow government actors to easily evade the First Amendment's restrictions in spaces that are central to public discourse, and would be difficult or impossible for courts to apply online, where property rights are often ill-defined.

The Court should ensure that its public forum doctrine continues to safeguard these government-controlled spaces—which are so important to our democracy—against government censorship and distortion.

ARGUMENT

I. Government actors increasingly establish expressive forums for public discourse on privately owned communications infrastructure.

An ever-increasing amount of public discourse now takes place online. As Justice Kennedy noted two decades ago, "[m]inds are not changed in streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media." *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 802–03 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part). Today, the "most important places . . . for the exchange of views" are "the 'vast democratic forums of the Internet' in general . . . and social media in particular." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 868 (1997)) ("Seven in ten American adults use at least one Internet social networking service.").

The government has moved online, too. *See, e.g.*, Jacob R. Straus, Cong. Research Serv., R45337, *Social Media Adoption by Members of Congress:*

Trends and Congressional Considerations 1 (2018), https://perma.cc/3XEG-78ZR ("Many Members [of Congress] now use email, official websites, YouTube channels, Twitter, Facebook, Instagram, Flickr, Google+, Medium, and other networking platforms to share information with and collect information from their followers."). In many contexts, government actors speak and associate online in much the same way that private citizens do. In other contexts, however, government actors establish official spaces online for expression by private citizens—digital analogs to town halls and public squares.

Thus, government websites sometimes include interactive blogs through which agencies describe and explain their policies and invite and enable citizens to post comments and questions in response. For example, the Transportation Security Administration's official website hosts a comment-enabled blog whose stated "purpose . . . is to communicate with the public about all things TSA related." Transp. Security Admin.: TSA Blog, https://perma.cc/4RMU-93MX; *see also, e.g.*, Fed. Trade Commission: FTC Blogs, https://perma.cc/8N6Q-JTG3 (hosting twin "business" and "consumer" blogs that allow for comments); Fed. Comm. Commission: FCC Blog, https://perma.cc/LSZ2-M9KE; U.S. Dep't of Veterans Affairs: VAntage Point, http://perma.cc/85YN-6X3D.

Government actors also host virtual town halls—online or by phone—to interact with the public. *See, e.g., 21st Century Town Hall Meetings*, Cong. Mgmt.

Found., http://perma.cc/N9A4-A4FC. Some elected officials have adopted these "tele-town halls" as a primary means of interacting with their constituents, *see, e.g.*, Tom Troy, *Tele-Town Halls: Latta Connects via Phone in lieu of In-Person Events*, Toledo Blade (May 7, 2017), http://perma.cc/D99H-ARVZ (identifying elected officials for whom tele-town halls have become "regular practice"), while others rely on tele-town halls when in-person meetings are not feasible, *see, e.g.*, Shane Goldmacher, *Schumer Misses Town Hall in Brooklyn, but Still Feels the Heat*, N.Y. Times (July 3, 2018), https://perma.cc/RGQ3-QUFF (discussing New York Senator Chuck Schumer's decision to host a conference call for his constituents after he was unable to attend a planned in-person town hall meeting).[2]

Social media has become a particularly rich environment for public discourse, and government actors now routinely establish expressive forums on social media platforms to allow them to communicate with their constituents about government-related matters, and to allow their constituents to communicate with them and with each other. *See, e.g.*, *U.S. Digital Registry*, DigitalGov, http://perma.cc/5KRQ-FBBM (last

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[2] Many private companies specialize in providing tele-town hall services, allowing government representatives, typically elected officials, to speak to and hear from members of the public via remote audio or video conferencing. *See, e.g.*, Access Live, http://perma.cc/MY5J-S34F; iConstituent, http://perma.cc/L46L-PJ2K; Tele-Town Hall, http://perma.cc/R6NK-QACE.

updated July 25, 2018) (providing a database of thousands of registered federal government social media accounts); *cf. Packingham*, 137 S. Ct. at 1735–36 (explaining that social media platforms provide critical opportunities for members of the public "to engage in a wide array of protected First Amendment activity"). These digital forums "enable innovative forms of public participation and engagement," Ines Mergel, Social Media in the Public Sector 3 (2013), allowing "governments to gather information from citizens, to listen to their needs and interests, and to respond directly to them quickly and efficiently." Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. Rev. 1975, 2007 (2011); *see also Packingham*, 137 S. Ct. at 1735 ("[U]sers can petition their elected representatives and otherwise engage with them in a direct manner.").

Many officials create Facebook "Pages" for these purposes.[3] *See, e.g., Davison v. Randall*, Nos. 17-2002, 17-2003, 2019 WL 114012, at *7 (4th Cir. 2019), *as amended* (Jan. 9, 2019) (finding that a local government official used her Facebook Page "as a tool of governance"); *Leuthy v. LePage*, No. 17 Civ. 296, 2018 WL 4134628, at *4 (D. Me. Aug. 29, 2018) (describing the Facebook Page created and controlled by Maine Governor Paul LePage and his staff). Some government officials also host virtual town halls over Facebook "Live," Facebook's video streaming service. *See, e.g.*, John McCain (@johnmccain), Facebook (Mar. 23, 2017),

[3] Facebook Pages are designated spaces where "public figures" can "share their stories and connect with people." *How Do I Create a Page?*, Facebook, http://perma.cc/9W3P-B6V7.

http://perma.cc/D4UX-HP3E (town hall hosted by the late Arizona Senator John McCain on Facebook Live).

Other government officials use Twitter accounts to "tweet" messages to the public, and to allow those who "follow" their accounts to reply to their tweets and reply to others' replies. *See, e.g.*, *Packingham*, 137 S. Ct. at 1735 (noting widespread use of Twitter among members of Congress and "Governors in all 50 States"); *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 552–54 (S.D.N.Y. 2018) (describing President Donald Trump's use of his @realDonaldTrump Twitter account for matters relating to government); *FTC Social Media Chats*, Fed. Trade Commission, http://perma.cc/K3LE-CAY5 ("The FTC hosts or participates in Twitter chats . . . . Chats are open to the public and everyone is encouraged to participate."); Justin Herman, *Twitter Chat Guidance for Federal Agencies*, DigitalGov (Oct. 16, 2013), http://perma.cc/YW77-CCEH ("Many agencies across government have used Twitter town halls and chats for years to bring their mission directly to the public by answering questions, soliciting feedback, or collaborating on ideas.").

Government actors also participate in live video conferencing with constituents through Google "Hangouts." *See, e.g.*, Kelly Mae Ross, *Members Warming to Google Hangouts*, Roll Call (Nov. 11, 2013), http://perma.cc/BE5L-WT2Q. Some upload videos to and livestream events on YouTube, where they solicit user comments in response. *E.g.*, NASA, *Community*, YouTube https://perma.cc/J622-3N4Z.

Others answer uncensored questions from Reddit users in "Ask Me Anything" comment threads. *E.g.*, *I'm Rep. Beth Fukumoto, Former Republican, Current Independent, Prospective Democrat*, Reddit (Apr. 12, 2017), http://perma.cc/9W22-ZHDV (Hawaii state representative Beth Fukumoto providing more than two dozen responses to substantive questions on U.S. policy and politics).

These expressive spaces are diverse in their purposes and configurations, but collectively they are increasingly vital to our democracy, providing significant sources of information, and venues for debates, about government. More and more, these interactive spaces are where public discourse takes place. *See* Lidsky, *supra*, at 2003 (stating that public officials are using social media because "that's where the citizens are"); *see also* Mergel, *supra*, at 14–15 (reporting that the majority of government social-media officers interviewed agreed that they used social media because "[w]e have to be where the people are if we want to reach them" (citation omitted)). By taking advantage of these digital-age opportunities for public engagement, government actors create new and important opportunities for First Amendment-protected expression.

Crucially, however, all of these spaces are dependent on privately owned communications infrastructure. Facebook, Google, Twitter—these are all private companies. *See* John D. Inazu, *Virtual Assembly*, 98 Cornell L. Rev. 1093, 1128 (2013) ("[T]he vast majority of speech on the Internet today occurs within private places and spaces that are owned and regulated by private entities."); Alissa

Ardito, *Social Media, Administrative Agencies, and the First Amendment*, 65 Admin. L. Rev. 301, 313 (2013) ("[P]ublic space online is next to non-existent.").

Indeed, online, even spaces that are government-owned are almost always dependent on private intermediaries, such as web-hosting companies and content-distribution networks. *See, e.g.*, Rebecca MacKinnon et al., United Nations Educ., Sci. & Cultural Org., Fostering Freedom Online: The Role of Internet Intermediaries 21–24 (2014), http://perma.cc/X8P8-QK6V (categorizing the "services and platforms that host, give access to, index, or facilitate the transmission and sharing of content" on the Internet); David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 Loy. L.A. L. Rev. 373, 377 (2010) ("[The Internet] is layered on privately owned Web sites, privately owned servers, privately owned routers, and privately owned backbones."). Many of the most important spaces for expression in the digital age—including spaces that are established and hosted and regulated by the government—rely on privately owned communications infrastructure.

II. This Court's public forum doctrine safeguards public discourse in government-controlled expressive spaces that are crucial to democracy.

This Court has made clear that the public forum doctrine applies to expressive spaces that the

government either owns or controls, "[w]herever the title . . . may rest." *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). The application of the doctrine to spaces that the government owns or controls reflects the doctrine's underlying purpose, which is to prevent government distortion of public discourse in spaces that are critical to democratic self-government. As public discourse moves online, it is crucial that the Court continue to apply the public forum doctrine to digital spaces that "share essential attributes" of offline public forums, *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009), when those spaces are owned or controlled by the government.

This Court's public forum doctrine has long served to ensure that government-established spaces which are indispensable to public discourse and democratic self-government are "free[] from government manipulation." Lillian R. BeVier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 Sup. Ct. Rev. 79, 93 (emphasis omitted). As the Court has recognized, "[t]here is an 'equality of status in the field of ideas,'" and the "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 96 & n.4 (1972) (quoting Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People 27 (1948)).

Appropriately, the Court's public forum jurisprudence has focused principally on the function served by the expressive space in question.

See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983) (explaining that the "existence" of a public forum "depend[s] on the character of the property at issue"). The Court has applied the doctrine not only to "traditional public forums," such as streets or parks, that have "immemorially been held in trust for the use of the public," *id.* at 45 (quoting *Hague*, 307 U.S. at 515), but also to "designated public forums," nontraditional "place[s] or channel[s] of communication" opened up by the government for expressive activity, *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985), that "share essential attributes of a traditional public forum," *Pleasant Grove City*, 555 U.S. at 469.[4]

The Court has also applied the doctrine to spaces that "lack[] a physical situs," *Cornelius*, 473 U.S. at 801; *see also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995) (noting that public forums may be "metaphysical" as well as "spatial or geographic"), reflecting the Court's recognition that First Amendment protections against censorship must apply with full force in any forum, including nontraditional forums, that the government establishes for the purpose of open public debate.

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[4] These "essential attributes" include whether the space: is "generally open to the public," *Widmar* v. *Vincent*, 454 U.S. 263, 268 (1981); is "designed for and dedicated to expressive activities," *Se. Promotions, Ltd.*, 420 U.S. at 555; or has as "a principal purpose . . . the free exchange of ideas." *Cornelius*, 473 U.S. at 800.

Consistent with its focus on protecting speech in government-established spaces, the Court has applied the public forum doctrine not only to expressive spaces established on government-owned property, but also to those established on government-controlled property that is privately owned.

In *Southeastern Promotions, Ltd. v. Conrad*, the Court held that a "privately owned . . . theater under long-term lease to the city" was a First Amendment-protected public forum. 420 U.S. 546, 547, 552, 555 (1975). The Court observed that the theater was "designed for and dedicated to expressive activities." *Id.* at 555; *see also Cornelius*, 473 U.S. at 803 ("[T]he Court found a public forum where a municipal auditorium and a city-leased theater were designed for and dedicated to expressive activities." (citing *Se. Promotions, Ltd.*, 420 U.S. at 555)). The Court also highlighted that the municipality held "the power to deny use of a forum in advance of actual expression." *Id.* at 553; *see also id.* at 564 ("[A]ny system which permits governmental officials to inhibit or control the flow of disturbing and unwelcome ideas to the public threatens serious diminution of the breadth and richness of our cultural offerings."). Although the Court's opinion did not separately address the theater's ownership, the fact that a private landlord owned the theater did not prevent the Court from holding that the space—which the government opened to the public for expressive activities and to which the government controlled access—was a public forum under the First Amendment.

Since *Southeastern Promotions*, the Court has characterized the relevant inquiry as "whether a particular piece of personal or real property owned *or controlled* by the government is in fact a 'public forum.'" *U.S. Postal Serv. v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 132 (1981) (emphasis added);[5] *see also Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 679 (2010) ("[I]n a progression of cases, this Court has employed forum analysis to determine when a governmental entity, *in regulating property in its charge*, may place limitations on speech." (emphasis added)); *Cornelius*, 473 U.S. at 801 (noting that public forum analysis applies to "public property or *private property dedicated to public use*" (emphasis added)). Just this past term, the Court referred again to the "three types of *government-controlled* spaces:

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[5] In *U.S. Postal Service*, the Court considered the contention that private mailboxes should be deemed public forums. 453 U.S. at 128–31. While it rejected the argument, it did so not (as *amicus* Chicago Access Corporation suggests) because the government lacked formal property rights in the mailboxes, but because the mailboxes were not expressive spaces to which the plaintiff civic groups had any right of access. *Id.* at 128–29. *Contra* Brief for Amicus Curiae Chicago Access Corp. in Support of Petitioners at 21, No. 17-1702 (U.S. Dec. 11, 2018) (citing *U.S. Postal Service* for the incorrect assertion that the Court "has declined to treat as a public forum private property over which the government has *control* but no formal property rights"). The Court wrote that it found it "difficult to conceive of any reason" to "treat a letterbox differently for First Amendment access purposes than it has in the past treated" property that the government clearly owns outright, such as "the military base . . . , the jail or prison . . . , or the advertising space made available in city rapid transit cars." *Id.* at 129–130 (citations omitted).

traditional public forums, designated public forums, and nonpublic forums." *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018) (emphasis added).

In a diversity of contexts, lower courts have similarly applied the public forum doctrine to spaces controlled by the government but not owned by it. *See, e.g., United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 748–51 (6th Cir. 2004) (applying public forum analysis to government officials' exclusion of union members from public and private property near polling stations); *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1122 (10th Cir. 2002) (applying public forum analysis to a public easement over a privately owned street and noting that "forum analysis does not require that the government have a possessory interest in or title to the underlying land"); *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 491, 494–95 (7th Cir. 2000) (applying public forum analysis to a section of a formerly public park sold to a private fund).

Recently, lower courts have applied the public forum doctrine to social media accounts and pages controlled by government actors and used for official purposes. For example, in *Davison v. Randall*, the Fourth Circuit addressed a First Amendment challenge to a local government official's blocking of a critic from her official Facebook Page. The court held that the "interactive components" of the Page—that is, the sections in which members of the public post their own comments—constituted a public forum because the defendant "retained and exercised significant control over the page." *Davison*,

2019 WL 114012, at *10. Similarly, in *Knight First Amendment Institute at Columbia University v. Trump*, the district court held that President Donald Trump and his aide violated the First Amendment by blocking critics from the @realDonaldTrump Twitter account because, "[t]hough Twitter is a private . . . company that is not government-owned, the President and [his aide] nonetheless exercise control over various aspects of the @realDonaldTrump account." 302 F. Supp. at 566–67. These courts have correctly recognized that the First Amendment protects individuals against government censorship in social media spaces that are controlled by government officials and opened to the public, even if the social media platforms are privately owned.[6]

III. A rigid property-based rule would risk categorically foreclosing application of the public forum doctrine to expressive spaces online.

As public discourse moves online, it is crucial that the Court continue to apply the public forum doctrine to spaces that "share essential attributes" of a public forum, *Pleasant Grove City*, 555 U.S. at 469, whether those spaces are owned by the government or simply controlled by it. Government censorship and manipulation in a government-regulated expressive space inflicts the same injury

[6] To say that the First Amendment forbids the government from engaging in viewpoint-based discrimination in these spaces is not to say that the private owners of the spaces can be held liable under the First Amendment.

on public discourse, and on the mechanisms of self-government, whether the expressive space is owned or controlled by the government. Applying the public forum doctrine to expressive spaces on property that is government controlled but not government owned is necessary to prevent government manipulation of public discourse in the expressive spaces in which speech crucial to our democracy increasingly takes place.[7]

Amicus Chicago Access Corporation proposes that the Court replace a flexible inquiry into the extent and nature of government control with a rigid rule that would foreclose application of the public forum doctrine to "private property in which the government holds no formal [property] interest." *See* Brief for Amicus Curiae Chicago Access Corp. in Support of Petitioners, *supra*, at 2–3, 16–22; *see also Denver Area*, 518 U.S. at 826–31 (Thomas, J., concurring in the judgment in part and dissenting in part) (maintaining that the Court should "limit[] the government's ability to declare a public forum to property the government owns outright, or in which the government holds a significant property interest

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[7] Public officials retain their own First Amendment rights, of course, and the public forum doctrine does not transform every expressive space established by a public official online into a public forum under the First Amendment. Whether any particular expressive space online should be deemed a public forum will turn not only on who established the space but also on how the space is used. *See, e.g.*, *Davison*, 2019 WL 114012, at *1 (distinguishing a local government official's "official" Facebook Page—which the court held was a public forum—from the official's "personal profile and a Page devoted to her campaign").

consistent with the communicative purpose of the forum to be designated").

The Knight Institute respectfully submits that narrowing the public forum doctrine in this way would be a mistake. That the government possesses a property interest in a particular space will of course be *relevant* to whether that space should be deemed a public forum. But foreclosing the possibility of public forums on property in which the government does not possess such an interest would be problematic for multiple reasons.

As an initial matter, a rule that turned solely on property rights would be impossible or impracticable to apply to digital-age technology, which has disrupted settled property law paradigms. *See Knight First Amendment Inst.*, 302 F. Supp. at 566 (explaining that a "requirement of governmental control . . . better reflects that a space can be 'a forum more in a metaphysical than in a spatial or geographic sense,' . . . and may 'lack[] a physical situs,' . . . in which case traditional conceptions of 'ownership' may fit less well" (quoting *Rosenberger*, 515 U.S. at 830; *Cornelius*, 473 U.S. at 801)). The precise contractual or property interests held by government actors using privately owned communications networks are often ill-defined. A single social media account or page, for example, "encompasses a web of property rights." *Davison*, 2019 WL 114012, at *9 n.4.

More fundamentally, a rule that focused solely on property rights would make it easy for government actors to evade the First Amendment's protections.

Cf. Freedom from Religion Found., Inc., 203 F.3d at 491 ("[A]dherence to a formalistic standard invites manipulation"). Government actors could opt out of constitutional commands simply by choosing to host town halls and city council meetings not on government property but in private facilities across the street. Or they could opt out of the same First Amendment commands by hosting forums for their constituents online rather than offline. There would be no logic to such a rule. As the Fourth Circuit recently asked, "why should a municipality be allowed to engage in viewpoint discrimination when holding a virtual public meeting hosted on a private website when such discrimination would be unconstitutional if the meeting was held in a governmental building?" *Davison*, 2019 WL 114012, at *11.

Thus, an abandonment of the Court's more flexible approach to the public forum doctrine in favor of a more rigid one focused solely on property rights would have far-reaching implications for digital-age expressive forums that are increasingly important to our democracy. Such a rule would call into question the application of the public forum doctrine to government-controlled social media pages and tele-town halls, because these forums exist on communications infrastructure that is privately owned. It would also call into question the application of the doctrine to government blogs, since those blogs are usually hosted by and transmitted through privately owned intermediaries. In these spaces, government officials would be free to censor speakers on the basis of their criticism of government policy, to manipulate debate

in other ways, and to transform what might have been dynamic and generative expressive forums into echo chambers. *Cf.* Ardito, *supra*, at 304 ("A new forum for citizen participation may be subverted into an arena for acclamation."). And it would sacrifice the integrity and vitality of public discourse in these spaces for no obvious compensating benefit for the government, the property owners, or the public.[8]

The prospect of government censorship and distortion of these important digital spaces is not merely speculative. Indeed, there is already ample evidence that "[g]iving government free rein to exclude speech it dislikes by delimiting public for a . . . would have pernicious effects in the modern age." *Denver Area*, 518 U.S. 727, 802–03 (1996) (Kennedy, J.).

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[8] Adopting a property-based rule would have broad implications for speech offline as well. Elected officials frequently hold open town halls in a wide array of privately owned *physical* spaces—including non-profit community centers, retirement homes, places of worship, coffeeshops, and restaurants—without first acquiring an interest in the property. *See, e.g.*, Beto O'Rourke (@BetoORourkeTX16), *November Town Hall*, Facebook (Nov. 17, 2018), https://perma.cc/WSP8-PQ8T?type=image (publicizing a general town hall for constituents hosted by Texas Representative Beto O'Rourke at the El Paso Community Foundation, a private non-profit organization); *Be Involved*, Mike Weissman, State Representative, https://perma.cc/KTD3-E7QM (listing a monthly town hall meeting hosted by multiple Colorado state officials at the Heather Gardens Community Center, a private senior living community). A property-based rule would leave public officials free to ostensibly open these forums to the public at large and then selectively eject citizens whose views they disfavored.

Agencies and officials at all levels of government and across the political spectrum have adopted the practice of blocking or censoring from their social media accounts individuals who disagree with them or criticize their official decisions. *See, e.g.*, Gov. Block Lists Revealed, http://perma.cc/BKB7-9K3K (documenting the results of public records requests to obtain a list of users blocked from government actors' social media accounts); *see also* Brady McCombs, *Politicians Blocking People on Social Media Ignites Debate*, AP News (Aug. 10, 2017), http://perma.cc/L867-U9DB; Charles Ornstein, *Trump's Not the Only One Blocking Constituents on Twitter*, ProPublica (June 7, 2017), http://perma.cc/B3GP-K3H8.

At the federal level, President Donald Trump has blocked his critics from participating in the comment threads associated with his Twitter account, @realDonaldTrump. *See Knight First Amendment Inst.*, 302 F. Supp. 3d at 553–54. Federal agencies—including the Department of Veterans Affairs, Department of Energy, Department of Labor, and the Small Business Administration—have similarly blocked disfavored speakers from their official Facebook Pages and Twitter accounts. *See* Leora Smith & Derek Kravitz, *Governors and Federal Agencies Are Blocking Nearly 1,300 Accounts on Facebook and Twitter*, ProPublica (Dec. 8, 2017), http://perma.cc/NB4Z-JPGH.

At the state and local level, several governors have blocked users from their official social media accounts and pages. *See id*; *see also, e.g.*, *Morgan v. Bevin*, 298 F. Supp. 3d 1003, 1006 (E.D. Ky. 2018)

(Kentucky Governor Matt Bevin); 1stamendmnt, *FAC Prompts Disclosure of California Governor Jerry Brown's Social Media 'Block Lists,'* First Amend. Coalition (Sept. 26, 2017), http://perma.cc/WB76-DXYQ (California Governor Jerry Brown). A recent investigative report found that "a quarter of San Diego County's elected officials" have blocked users on Facebook and Twitter. Tom Jones & Nicholas Kjeldgaard, *Local Politicians Blocking Access to Social Media Accounts*, NBC 7 San Diego (June 5, 2018), http://perma.cc/ATG5-TTC9. And a number of local governments have settled First Amendment suits challenging their adoption of policies authorizing the deletion of comments and blocking of users from local agency and elected official social media accounts.[9]

While some of these technologies are still relatively new, it is already clear that, without the

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[9] *See, e.g.*, Samantha Weigel, *San Mateo Updates Twitter Policies in Legal Settlement*, Daily J. (May 20, 2017), http://perma.cc/ZT5A-8V4V (reporting that a settlement reached by the city of San Mateo in a First Amendment and public records suit required the mayor to "unblock his Twitter account"); Cara Anthony, *Beech Grove, ACLU Reach Settlement in Facebook Case*, Indianapolis Star (Aug. 4, 2016), http://perma.cc/7M9X-RWYL (reporting that the city of Beech Grove settled a First Amendment suit for deleting critical comments from the municipal police department's Facebook Page); Andrew Walden, *HPD Ordered to Pay $31K over Censored Facebook Comments*, Hawai'i Free Press (June 27, 2014), http://perma.cc/96PA-QLGC (reporting that the Honolulu Police Department settled a First Amendment over its deleting unfavorable comments and banning users from the Department's Facebook Page).

public forum doctrine, public discourse in government-controlled expressive spaces online would be marked by official suppression and distortion. The public forum doctrine has an important role to play in safeguarding the integrity and vitality of speech in these spaces that are so important to democratic self-government.

CONCLUSION

Amicus respectfully submits that the Court should affirm the judgment below.

Respectfully submitted,

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